

MICHIGAN DEPARTMENT OF CIVIL SERVICE
REGULATION

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Subject: GRIEVANCE AND GRIEVANCE APPEAL PROCEDURES			

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1. PURPOSE

This regulation prescribes procedures for an employee to (1) file a grievance with an appointing authority and (2) appeal a final grievance decision of the appointing authority to the Department of Civil Service.

2. CIVIL SERVICE RULES

The following civil service rules are reprinted here for reference.

Rule 8-1: Grievances

8-1.1 Grievance Authorized

An employee may file a grievance with an appointing authority, as authorized in the civil service rules and regulations.

(Civil Service Rules, continued)

8-1.2 Time Limits

A grievance must be filed in writing within 14 calendar days after the employee knew of or, in the exercise of reasonable diligence, should have known of the circumstances giving rise to the grievance.

8-1.3 Types of Grievances

(a) Types of grievances permitted. *A grievance must allege that the employee is aggrieved by one or more of the following actions of the appointing authority:*

- (1) Discrimination prohibited by rule 1-8 [Prohibited Discrimination].*
- (2) Reprisal prohibited by rule 2-10 [Whistleblower Protection].*
- (3) Discipline without just cause.*
- (4) Written counseling or a less-than-satisfactory service rating issued without just cause.*
- (5) The abolition or creation of a position for reasons other than administrative efficiency.*
- (6) An arbitrary and capricious lateral job change resulting in substantial harm.*
- (7) An action that substantially harmed the employee and violated (1) article 11, section 5 of the Michigan constitution, (2) a civil service rule or regulation, (3) a departmental work rule, or (4) an enforceable written grievance settlement permitted by the civil service rules or regulations.*
- (8) Any other action for which the civil service rules or regulations specifically permit a grievance to be filed.*

(b) Limitation on grievances.

- (1) Grievance not permitted.** *In addition to any other limitations in the civil service rules and regulations, the following limitations on grievances apply unless the grievant alleges that the action violated rule 1-8 [Prohibited Discrimination] or rule 2-10 [Whistleblower Protection].*

(A) SES or SEMAS employee without prior status. *A member of the senior executive service [SES] or the senior executive management assistant service [SEMAS] who is separated from state employment*

(Civil Service Rules, continued)

at the expiration of an appointment cannot grieve the separation if the employee did not have prior status at the time of appointment to the SES or the SEMAS.

(B) Employee in limited-term position. *An employee in a limited-term position whose appointment is terminated at or before the end of the term of appointment due to lack of work or funding cannot grieve the termination.*

(2) Management rights. *Unless specifically authorized in the civil service rules or regulations, an employee cannot grieve the employer's exercise of any of the rights reserved to management in rule 6-4 [Rights of Employer].*

(3) Lateral job change. *A grievance regarding a nondisciplinary lateral job change may be grieved only under the provisions of subsection (a)(1), (a)(2), (a)(6), or (a)(7), as appropriate. In addition, a grievance regarding a disciplinary lateral job change may be grieved under the provisions of subsection (a)(3).*

(4) Technical appointment complaints. *The following complaints cannot be filed as a grievance but must be filed directly with the department of civil service under the technical appointment complaint provisions in rule 8-3 [Technical Complaints]:*

(A) Unsuccessful candidate. *A complaint by an unsuccessful candidate regarding a technical appointment decision or arising out of the selection, appointment, or certification of a candidate.*

(B) Employee whose appointment is revoked. *A complaint by an employee whose appointment is revoked in compliance with rule 8-3 [Technical Complaints].*

8-1.4 Grievance Decision by Appointing Authority

(a) Grievance review and decision. *The appointing authority shall review the grievance and issue a written grievance decision, as provided in the regulations. If the appointing authority fails to answer the grievance within the time permitted in the regulations, the appointing authority is deemed to have denied the grievance.*

(b) Appeal of grievance decision. *The final grievance decision of the appointing authority is binding unless the grievant files a timely appeal of the decision, as authorized in rule 8-2 [Appeals of Grievance Decisions] and the civil service regulations.*

(Civil Service Rules, continued)

Rule 8-2: Appeals of Grievance Decisions

8-2.1 Appeal of Grievance Decision to Department of Civil Service Authorized

A grievant may appeal a final grievance decision of an appointing authority to the department of civil service, as authorized in the civil service rules and regulations.

8-2.2 Limitation on Grievance Appeals

A grievant is not authorized to file a grievance appeal unless the grievance alleges one or more of the following:

- (a) A tangible adverse employment action resulting from discrimination prohibited in rule 1-8 [Prohibited Discrimination].*
- (b) A tangible adverse employment action resulting from reprisal prohibited by rule 2-10 [Whistleblower Protection].*
- (c) Dismissal, demotion, suspension, reduction in pay, or disciplinary lateral job change without just cause.*
- (d) A tangible adverse employment action caused by the abolition or creation of a position.*
- (e) An arbitrary and capricious lateral job change resulting in substantial harm.*
- (f) Denial of compensation to which the grievant was entitled under the civil service rules and regulations.*
- (g) An unsatisfactory service rating issued without just cause.*
- (h) A less-than-satisfactory overall performance-pay evaluation issued without just cause.*
- (i) An action that substantially harmed the employee and violated (1) article 11, section 5 of the Michigan constitution, (2) a civil service rule or regulation, (3) a departmental work rule, or (4) an enforceable written grievance settlement permitted by the civil service rules or regulations.*
- (j) Any other action for which the civil service rules or regulations specifically permit a grievance appeal to be filed.*

(Civil Service Rules, continued)

8-2.3 Further Limitations on Grievance Appeals

The following additional limitations apply to a grievance appeal unless the grievant alleges that the action of the appointing authority violated rule 1-8 [Prohibited Discrimination] or rule 2-10 [Whistleblower Protection]:

(a) Probationary employee. *A probationary employee cannot appeal the final grievance decision of the appointing authority regarding any of the following:*

- (1) A probationary service rating.*
- (2) A decision to extend an employee's probationary term.*
- (3) If the employee did not have status at the time of the probationary appointment, a decision by the appointing authority to dismiss the employee during the probationary period or within 28 calendar days after the end of the probationary period.*

(b) Reprimand or counseling. *An employee cannot file a grievance appeal regarding a reprimand or counseling.*

8-2.4 Civil Service Grievance Appeal Procedures

(a) Regulations. *The state personnel director shall issue regulations governing the grievance appeal and arbitration procedures.*

(b) Referral. *If a grievance appeal is not administratively dismissed under rule 8-4 [Summary Dismissal], a hearing officer or arbitrator shall conduct an expeditious review in accordance with the civil service rules and regulations.*

(1) Hearing officer. *Unless the grievant elects arbitration under subsection (b)(2), the grievance appeal is referred to a hearing officer designated or appointed by the state personnel director.*

(2) Arbitration alternative. *As an alternative to the referral provided in subsection (b)(1), the grievant may elect to have a grievance appeal heard by an arbitrator.*

(A) Cost. *The grievant and the appointing authority shall share the cost of the arbitration equally.*

(Civil Service Rules, continued)

- (B) **Applicable rules and regulations.** *An arbitrator shall decide a grievance appeal under the same civil service rules and regulations that would be applicable if the grievance appeal were heard by a hearing officer, except as otherwise specifically provided in the regulations governing arbitration.*
- (c) **Decision.** *At the conclusion of the grievance appeal, the adjudicating officer shall issue a written decision setting forth findings of fact, conclusions of law, and remedial orders, if any.*
- (1) **Attorney fees and costs prohibited.** *An adjudicating officer cannot award attorney fees, witness fees, costs, or other expenses.*
- (2) **No interest on award.** *An adjudicating officer cannot award interest on any monetary award.*
- (3) **Limitation on damages for limited-term appointments.** *An adjudicating officer cannot award to a grievant in a limited-term appointment, the senior executive service, or the senior executive management assistant service, any damages for any period after the date of expiration of the grievant's term of appointment.*

8-2.5 Further Appeal to Commission Authorized

A party that appeared and participated in a grievance appeal, including an arbitration, may file a further appeal of the final decision of the adjudicating officer to the civil service commission, as provided in the civil service rules and regulations.

8-2.6 Effective Date of Decision of Adjudicating Officer; Automatic Stay; Exception

- (a) **Effective date.** *A grievance appeal decision is final and binding on the parties 29 calendar days after the date the decision is issued, unless either (1) the decision provides for a later effective date or (2) a party files a further appeal to the civil service commission within 28 calendar days after the date the decision is issued. If a party files a timely appeal to the civil service commission within 28 calendar days after the date the decision was issued, the effective date of the decision is automatically stayed pending further order of the employment relations board or civil service commission.*

(Civil Service Rules, continued)

- (b) **Exception; grievant's reinstatement ordered.** *If a final decision of an adjudicating officer orders an appointing authority to reinstate a grievant who had been dismissed for cause, the appointing authority, as a condition of further appeal to the civil service commission, shall either (1) reinstate the grievant or (2) restore the grievant's base pay and medical, dental, and vision group insurance. The appointing authority shall continue the reinstatement or payment of base pay and benefits while the appeal to the commission is pending, as provided in the civil service regulations.*

3. **DEFINITIONS**

3.1 DEFINITIONS IN RULES

1. **Adjudicating Officer**

Adjudicating officer means the state personnel director or other civil service administrative officer, technical review officer, hearing officer, arbitrator, or other officer authorized to make a decision reviewable by the civil service commission.

2. **Administrative Officer**

Administrative officer means the state personnel director or a person authorized by the state personnel director to take administrative action on matters filed with the department of civil service or the civil service commission.

3. **Agency of Convenience**

Agency of convenience means a subdivision within a principal department for which a separate appointing authority has been designated.

4. **Appointing Authority**

Appointing authority means each of the following:

- (a) *A single executive heading a principal department.*
- (b) *A chief executive officer of a principal department headed by a board or commission.*
- (c) *A person designated by either of the preceding as responsible for administering the personnel functions of the department, board, commission, or agency of convenience.*

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(Civil Service Rules, concluded)

5. Autonomous Entity

Autonomous entity means an executive branch organization or function established by law within a principal department, but specifically directed by law to be a separate independent unit, with the intent that its authority, powers, duties, and responsibilities, including personnel, budgeting, procurement, and management-related functions be exercised free from the direction and supervision of the principal department.

6. Grievance

Grievance means a complaint, authorized in rule 8-1, filed by a classified employee regarding an action by an appointing authority.

7. Hearing Officer

Hearing officer means a person authorized by the state personnel director to administer oaths and conduct hearings as provided in the civil service rules and regulations.

8. Party

Party means any of the following persons or organizations:

(a) **Party**, in a grievance appeal, means any of the following:

- (1) The employee who filed the grievance.
- (2) The appointing authority that issued the final grievance decision being appealed.

* * *

9. Principal Department

Principal department means one of not more than 20 executive branch departments provided for by article 5, section 2, of the constitution.

3.2 ADDITIONAL DEFINITIONS USED IN THIS REGULATION

- (a) **Authorized representative** means a person qualified in Section 7 and authorized by a party in a departmental grievance proceeding or civil service grievance appeal proceeding to appear on behalf of and to represent the interests of the party in that proceeding.
- (b) **Contested hearing** means a quasi-judicial proceeding before a hearing officer or arbitrator in which the parties, after notice, may introduce documentary evidence, examine and cross examine witnesses under oath, and submit arguments.
- (c) **Good cause** means an acceptable excuse for failing to file or take other required action timely. *Good cause* does not include a person's own carelessness, negligence, or inattention to the filing or other requirements.
- (d) **Group grievance** means grievances by two or more employees that have common issues of fact and law that the appointing authority elects to process in a single departmental grievance proceeding.
- (e) **Member of the household** means any person (1) living in the household or (2) whose financial or physical care is the principal responsibility, of the hearing officer or hearing officer's spouse.
- (f) **Family** includes a spouse, child, foster child, parent, foster parent, brother, or sister of the hearing officer or hearing officer's spouse.
- (g) **Mailed** means deposited in a United States Postal Service mail receptacle properly addressed, containing the document to be mailed, and with first-class postage fully prepaid on the envelope.
- (h) **Postmark** means a date stamp placed on a mailed envelope or a receipt issued by the United States Postal Service indicating the date the envelope was mailed or received by the United States Postal Service for mailing. A postmark does not include a date stamp placed by the sender, such as a postage meter stamp.
- (i) **Special extenuating circumstances** means a compelling excuse for the failure to file a matter timely that arises out of one of the following:
 - (1) An intentionally or fraudulently misleading action by an appointing authority or party that prevented the filing.

- (2) Serious physical or mental incapacity of the person that prevented the filing.
- (3) Extraordinary unforeseen circumstances that were outside the control of the person that prevented the filing.

4 **GRIEVANCE PROCEDURES AT DEPARTMENTAL LEVEL**

4.1 STEPS IN THE DEPARTMENTAL GRIEVANCE PROCEDURE

- (a) **Departmental Step 1.** The grievant shall file a written grievance on a form prescribed by the Department of Civil Service. The grievance must be filed with the departmental official designated to receive the grievance (the “**Step-1 Official**”).
 - (1) **Time limit for filing a written grievance.** The grievant must file a signed, written grievance no later than 14 calendar days after the date the grievant became aware of the grievance or, in exercise of reasonable diligence, should have become aware of the grievance. If a grievant does not timely file the written grievance, the grievance is waived.
 - (2) **Answer at step 1.** Within 14 calendar days after the grievance is filed, the Step-1 Official shall hold an informal conference with the grievant and issue a written answer to the grievance.
- (b) **Departmental Step 2.** If the grievant is not satisfied with the written answer of the Step-1 Official, the grievant may appeal the grievance decision to step 2. If a grievant does not timely file an appeal to step 2, the grievance is considered closed on the basis of the answer at step 1.
 - (1) **Time limit for filing appeal to step 2.**
 - (A) **After step-1 answer.** If the Step-1 Official issues a timely answer at step 1, the employee must file a written appeal to the appointing authority or other designated officer (the “**Step-2 Official**”) no later than 14 calendar days after the date of the step-1 answer is issued to the grievant.
 - (B) **No step-1 answer.** If the Step-1 Official does not answer the grievance in writing within 14 calendar days after the grievance is filed, the Step-1 Official is presumed to have denied the grievance. Thereafter, the grievant is authorized to appeal to

the Step-2 Official. An appeal to step 2 must be filed within 21 calendar days after the last day for the Step-1 Official to respond.

- (2) **Answer at step 2.** Within 28 calendar days after the appeal to step 2 is filed, the Step-2 Official shall hold any conference deemed necessary and issue a written answer to the grievant.
- (c) **Appeal of Step-2 Answer.** If the grievant does not file a timely appeal of the step-2 answer to the Department of Civil Service, the grievance is considered closed on the basis of the step-2 answer.

4.2 FILING TIMELY

A grievance or grievance appeal must be filed with the appropriate Step-1 or Step-2 Official before the end of the period specified in this regulation. In order to be timely, a written grievance or grievance appeal must be received in the office of the appropriate Step-1 Official or Step-2 Official before 5:00 p.m. of the last day of the period. Time is counted as provided in Section 4 of Regulation 8.06 [Computing Time and Filing Documents]. A grievance or grievance appeal must be delivered to the appropriate Step-1 or Step-2 Official by one of the following methods:

- (a) **Delivery.** The document may be delivered in person, by mail, or by other carrier to the designated office of the appropriate Official.
- (b) **Facsimile.** If the appropriate Official has listed a facsimile number for receiving grievances, the document may be delivered by facsimile to that number.
- (c) **E-mail.** If the appropriate Official has established an e-mail address for receiving grievances, the document may be delivered by e-mail to that address.

4.3 EFFECT OF LATE FILING

If a grievant files a grievance at step 1 or step 2 after the established deadline, the Step-1 or Step-2 Official cannot accept the filing unless the grievant establishes either good cause or special extenuating circumstances that excuse the late filing. If the grievant's reasons fail to establish the required good cause or special extenuating circumstances, the grievance is denied as untimely.

- (a) **Good cause.** A filing that is received up to 28 calendar days late cannot be accepted unless the filing party establishes good cause for the late filing.
- (b) **Special extenuating circumstances.** A filing that is received more than 28 calendar days but less than 1 year late cannot be accepted unless the filing party establishes special extenuating circumstances for the late filing.
- (c) **Maximum Limit.** A filing that is 1 year or more late cannot be accepted.

4.4 EXTENSION OF TIME TO FILE OR RESPOND

A grievant and the appropriate Step-1 or Step-2 Official may agree in writing to extend the time to file a grievance, appeal to step 2, or answer the grievance. An extension cannot exceed 6 months.

4.5 GROUP GRIEVANCE

- (a) **Joint grievance form.** If two or more employees have a grievance with common issues of fact and law, they may jointly file a single grievance form. Each employee filing a joint grievance must personally sign the grievance form. A joint grievance may be filed at step 1 only if the same Step-1 Official is responsible for responding to all the grievants. Otherwise, the joint grievance must be filed directly at step 2.
- (b) **Group grievance.**
 - (1) If two or more employees file a joint grievance, the appointing authority has the discretion to (1) process the multiple grievances in a single group grievance or (2) process each employee's grievance as a separate grievance.
 - (2) If two or more employees file separate grievances that have common issues of fact and law, the appointing authority has the discretion to process the multiple grievances into a single group grievance.

4.6 SKIPPING STEP 1

A grievant may file a grievance directly at step 2 if the grievant was dismissed, suspended without pay, demoted, laid off, or otherwise aggrieved by an action taken by management above the level of the Step-1 Official. If a grievance is filed

directly at step 2, the step-2 procedures and time frames are applicable. However, the Step-2 Official or a designated official must hold an informal conference with the grievant before issuing the step-2 answer, unless the grievant declines to attend the conference.

5. GRIEVANCE APPEAL PROCEDURES IN DEPARTMENT OF CIVIL SERVICE

5.1 FILING A GRIEVANCE APPEAL

(a) Authorized. If a grievant is not satisfied with the step-2 answer or the Step-2 Official fails to issue a timely answer, the grievant may appeal the final grievance decision to the Department of Civil Service. An appeal is filed when it is received by the Department of Civil Service, as provided in Regulation 8.06 [Computing Time and Filing Documents].

(b) Time limit to file an appeal to the Department of Civil Service.

(1) After Step-2 Answer. If the Step-2 Official issues a timely written grievance decision at step 2, the grievant must file an appeal to the Department of Civil Service no later than 28 calendar days after the date the step-2 answer was sent or issued.

(2) No Step-2 answer. If the Step-2 Official fails to issue a timely grievance decision at step 2, the Step-2 Official is presumed to have denied the grievance. Thereafter, the grievant is authorized to appeal to the Department of Civil Service. An appeal to the Department of Civil Service must be filed within 42 calendar days (6 weeks) after the last day for the Step-2 Official to respond.

(c) Contents of the appeal. The appeal must include all of the following:

(1) A listing of the grievant's (1) name, (2) employee identification number, (3) employing department or agency, (4) mailing address, (5) telephone number, (6) e-mail address, and (7) authorized representative, if any.

(2) If the grievant has an authorized representative, a listing of the authorized representative's (1) name, (2) organization, (3) mailing address, (4) telephone number, (5) fax number, and (6) e-mail address.

- (3) A copy of the original grievance and the responses issued by the Step-1 and Step-2 Officials.

5.2 LATE APPEAL

(a) **Action by administrative officer.** A grievance appeal that is received later than required by subsection 5.1(b) will not be accepted unless it is accompanied by a written explanation of the reasons for the late filing that establishes either good cause or special extenuating circumstances. If the late filing is not accompanied by a written explanation or if the explanation fails to establish required good cause or special extenuating circumstances, the administrative officer shall dismiss the grievance appeal as untimely.

(1) **Good cause.** A grievance appeal that is filed up to 28 calendar days late cannot be accepted unless the filing party establishes good cause for the late filing.

(2) **Special extenuating circumstances.** A grievance appeal that is filed more than 28 calendar day but less than 1 year late cannot be accepted unless the filing party establishes special extenuating circumstances for the late filing.

(3) **Maximum limit.** A grievance appeal that is filed 1 year or more late cannot be accepted.

(b) Decision by hearing officer.

(1) If the administrative officer does not decide the issue of good cause or special extenuating circumstances based on the written explanation provided by the grievant, the administrative officer shall refer the issue to the hearing officer for resolution.

(2) If the administrative officer finds good cause or special extenuating circumstances and accepts a late appeal, any party may request the assigned hearing officer to review the finding de novo.

5.3 ADMINISTRATIVE REVIEW OF GRIEVANCE APPEAL

A civil service administrative officer will review all grievance appeals filed with the Department of Civil Service.

- (a) **Dismissal by administrative officer.** The administrative officer may summarily dismiss a grievance appeal for any of the following reasons:
- (1) **Not authorized.** The grievant is not authorized to file the grievance or grievance appeal.
 - (2) **Lack of jurisdiction.** The Department of Civil Service lacks jurisdiction over a necessary party or over the subject matter of the grievance or grievance appeal.
 - (3) **Untimeliness.** The grievance appeal was untimely.
 - (4) **Another action pending.** Another civil service action has been initiated between the same parties involving substantially the same grievance or grievance appeal.
 - (5) **Barred by prior claim.** Substantially the same grievance or grievance appeal was adjudicated to finality in the civil service system in another action between the same parties.
- (b) **Dismissal by hearing officer.** If the administrative officer does not summarily dismiss a grievance appeal, a party may file a motion for summary dismissal with the assigned hearing officer.

5.4 MEDIATION AND CONCILIATION

The administrative officer or the hearing officer may require mediation or conciliation of a grievance appeal. A person who conducts a mediation or conciliation cannot be assigned as the hearing officer in the same matter. The person conducting a mediation or conciliation cannot later testify regarding any statement of a party or any offer of settlement made during the mediation or conciliation proceeding.

5.5 CIVIL SERVICE GRIEVANCE APPEAL PROCEDURES

If the administrative officer does not summarily dismiss the grievance appeal, the grievance appeal will be assigned to a hearing officer for disposition. The hearing

officer shall conduct a fair, impartial, and expeditious review and disposition of the grievance appeal in accord with rules 8-1 and 8-2 and these regulations.

5.6 LIMITATION ON COMMUNICATIONS

A hearing officer and party or a party's representative shall not communicate privately regarding the facts or merits of a pending matter. The hearing officer and a party or a party's representative may communicate privately as may be necessary for scheduling and administrative matters unrelated to the merits or facts.

5.7 DISQUALIFICATION OF HEARING OFFICER

- (a) **Who May Raise Issue of Disqualification.** A party or the hearing officer may raise the issue of the disqualification of a hearing officer.
- (b) **Grounds for Disqualification.** A hearing officer shall be disqualified when the hearing officer cannot impartially decide a matter. Specific grounds include, but are not limited to, the following:
 - (1) The hearing officer is personally biased or prejudiced for or against a party or the representative of a party.
 - (2) The hearing officer has been consulted by a party or a representative regarding the pending matter before assignment of the matter.
 - (3) The hearing officer has been employed by a party or a party's representative in any private matter in the preceding 5 years. Appointment as a neutral arbitrator in a private or public arbitration is not disqualifying employment.
 - (4) The hearing officer, the hearing officer's spouse, or a member of the family or household of either is any of the following:
 - (A) A party.
 - (B) A party's representative.
 - (C) A person known by the hearing officer to have more than a *de minimis* interest that could be substantially affected by the proceeding.

- (c) **Time for filing disqualification motion.** A motion to disqualify must be filed within 14 calendar days after the moving party discovers or, in the exercise of reasonable diligence, should have discovered the ground for disqualification.
- (d) **Ruling.**
- (1) The challenged hearing officer shall decide the motion.
 - (2) If the challenged hearing officer denies the motion, the moving party may request in writing that the State Personnel Director exercise superintending control and disqualify the challenged hearing officer.
 - (3) A request by the moving party must be filed in the Office of the State Personnel Director within 7 calendar days after the date the challenged hearing officer denied the motion.
 - (4) The State Personnel Director's decision on the motion is final.
- (e) **Motion granted.** When a hearing officer is disqualified, an administrative officer shall assign the grievance appeal to another hearing officer.

5.8 PREHEARING CONFERENCE

The hearing officer may conduct a prehearing conference in person or by telephone to consider any matters that will facilitate the fair and expeditious disposition of the grievance appeal, including, for example, the following:

- (a) The simplification of issues.
- (b) Obtaining stipulations and admissions of fact and of documents to avoid unnecessary proofs.
- (c) The identity of material facts in dispute.
- (d) Scheduling matters.
- (e) Prehearing exchange of documents.

5.9 SUBMISSIONS TO HEARING OFFICER; PROOF OF SERVICE

If a party submits any written material to the hearing officer, the party shall also serve a complete copy of the material on every other party at the same time. The

submitting party shall certify in writing that every other party has been served with the material and the manner of service.

5.10 SUMMARY DISPOSITION WITHOUT A HEARING

If there is no genuine issue as to any material fact, the hearing officer may decide the matter without a contested hearing based on the grievance record and the written submissions of the parties, including affidavits.

5.11 HEARING PROCEDURES - GENERAL

If the grievance appeal is not decided on summary disposition, a hearing officer shall conduct a contested hearing under the following general procedures:

- (a) **Time for hearing.** The hearing officer shall fix the date, time, and place for each hearing.
- (b) **Postponements.** Except in the case of a serious emergency, a request to postpone a scheduled hearing must be filed at least 14 calendar days before the scheduled hearing. A hearing officer may postpone a hearing at the request of a party if there is sufficient justification.
- (c) **Absence of a party or representative.** A hearing may proceed in the absence of a party or the representative of the party if the party or representative fails to appear and failed to obtain a postponement. If the party with the burden of proof fails to appear, the hearing officer may grant a default judgment to the responding party. If the responding party fails to appear, the hearing officer shall make an award in favor of the party with the burden of proof if that party introduces sufficient evidence to justify an award, consistent with the civil service rules and regulations. In a grievance appeal regarding discipline for just cause, the appointing authority is the party with the burden of proof. Any award must be consistent with applicable civil service rules and regulations.
- (d) **Prehearing exchange of documents.** When a hearing is scheduled, a party shall provide to every other party a copy of each document that the party intends to introduce into evidence in the party's case-in-chief. The copies must be delivered in person, by facsimile, or by e-mail to all other parties at least 7 calendar days before the hearing. Alternatively, the copies may be mailed to the other parties by first-class U.S. mail at least 14 calendar days before

the hearing. A party is not required to provide an advance copy of any document previously exchanged in the grievance. This section does not prohibit a party from introducing rebuttal evidence.

(e) Prehearing exchange of witness lists.

(1) Generally. When a hearing is scheduled, a party shall provide to every other party a written list of the names and titles of all witnesses the party intends to call to give evidence at the hearing. The list must be delivered in person, by facsimile, or by e-mail to all other parties at least 7 calendar days before the hearing. Alternatively, the list may be mailed to the other parties by first-class U.S. mail at least 14 calendar days before the hearing. A hearing officer may exclude testimony of a witness that was not timely listed if another party is materially disadvantaged by the failure to disclose the witness.

(2) Security risk; exception. If an appointing authority intends to call as a witness any prisoner or other person involuntarily committed to the custody of a state department, the witness may appear by telephone unless the hearing is held at location where the witness is located.

(f) Evidence. At the hearing, the hearing officer shall provide the parties a reasonable opportunity to present evidence, to examine and cross-examine witnesses, and to present argument. The hearing officer may swear witnesses, take testimony, receive evidence, including opinion evidence, and take such other actions as may be necessary to consider fairly the claims of the parties. The hearing officer may receive and consider the evidence of witnesses by affidavit, giving it only such weight as seems proper after consideration of any objection made to its admission. The rules of evidence do not apply, but the hearing officer may refuse to take or admit evidence that is repetitive, irrelevant, unreliable, or speculative.

(g) Hearing record. The hearing record shall include the following:

- (1)** The grievance and grievance appeal documents, including the written grievance and the written grievance answers.
- (2)** Documents admitted into evidence by the hearing officer.
- (3)** Sworn testimony of witnesses.

(4) Briefs and motions filed by the parties.

(5) All written orders and decisions of the hearing officer.

(h) **Civil service rules and regulations.** The hearing officer may judicially note civil service rules and regulations. Civil service rules and regulations need not be admitted into evidence unless there is a genuine dispute regarding the authenticity or text of the rule or regulation.

(i) **Departmental work rules.** Departmental work rules must be admitted into evidence.

5.12 ORDERS OF APPEARANCE, SUBPOENAS, AND DISCOVERY

(a) **Authority of adjudicating officer.** In order to obtain relevant and material evidence necessary to decide a matter pending before the Department of Civil Service, a civil service adjudicating officer is authorized to order persons to appear and give testimony or produce any evidence, including books, records, papers, correspondence, or documents in the person's possession or under the person's control.

(b) Orders of Appearance for Classified Employees

(1) **Requirements.** An adjudicating officer may issue an order to require a classified employee to appear to give testimony or produce evidence on request of a party or on the adjudicating officer's own motion. A party requesting an order of appearance must make the request in writing at least 21 calendar days before the scheduled appearance date. The adjudicating officer may issue an order on a late request only if the requesting party demonstrates good cause for the late request.

(2) **Service of order.** An order of appearance must be served on the classified employee to whom it is directed. If a party requests the order, that party is responsible for serving the order on the classified employee. If the adjudicating officer issues the order on the officer's own motion, the Department of Civil Service is responsible for serving the order. If a party seeks to serve an employee of an appointing authority that is not required to disclose home addresses of its employees, the appointing authority shall deliver the order to the employee on request of the party.

(3) Appearance of classified employees by order. All classified employees, as a part of their official duties, shall appear as directed by an adjudicating officer.

(A) An appointing authority shall release the employee from regularly scheduled work without loss of regular pay or leave credits for necessary travel and attendance to comply with the order of the adjudicating officer unless an emergency or critical safety concerns prohibit releasing the employee. The employee is not entitled to overtime pay or travel expenses.

(B) A classified employee ordered to produce evidence in the person's possession or under the person's control shall produce the evidence as ordered, even if employee or the employee's appointing authority objects to the order. If the employee or the employee's appointing authority objects to the order, either may file a written objection to the order at least 7 calendar days before the date the documents are to be produced. The hearing officer shall hear the objections and rule on them before requiring the employee to release the evidence.

(4) Voluntary appearance of classified employees. A witness may voluntarily appear at the request of a party. A classified employee who is a necessary witness and appears at the request of a grievant shall not lose any regular pay or leave credits for the period of necessary travel and attendance at a civil service hearing. The witness is not entitled to overtime pay or travel expenses.

(c) Orders to Departments.

(1) Requirements. An adjudicating officer may issue an order of appearance to a principal department, autonomous entity, or agency of convenience to provide testimony or to produce any evidence, including books, records, papers, correspondence, or documents in the possession of or under the control of the department, autonomous entity, or agency of convenience. The order may issue on request of a party or on the adjudicating officer's own motion.

(A) Before a party requests an order of appearance, the party must seek the voluntary agreement of the principal department, autonomous entity, or agency of convenience to appear. The party must affirmatively state in its request for an order of appearance that the party requested the appointing authority of the principal department, autonomous entity, or agency of con-

venience to voluntarily comply with the request and the appointing authority refused.

(B) A party requesting an order of appearance must make the request in writing at least 21 calendar days before the scheduled appearance date. The adjudicating officer may issue an order on a late request only if the requesting party demonstrates good cause for the late request.

- (2) Service of order.** An order of appearance must be served on the office of the appointing authority of the principal department, autonomous entity, or agency of convenience to which it is directed. If a party requests the order, that party is responsible for serving the order. If the adjudicating officer issues the order on the officer's own motion, the Department of Civil Service is responsible for serving the order.
- (3) Appearance of Principal Department, etc.** A principal department, autonomous entity, or agency of convenience shall comply with an order of appearance and provide one or more witnesses or produce the evidence as ordered unless it files an objection to the order at least 7 calendar days before the witness or evidence is to be produced.
- (4) Sanctions.** If a principal department, autonomous entity, or agency of convenience flagrantly and wantonly refuses to comply with an order of the adjudicating officer and the requesting party is materially disadvantaged by the refusal, the adjudicating officer may impose appropriate sanctions, up to and including dismissal of any claims or defenses of the offending principal department, autonomous entity, or agency of convenience.

(d) Subpoenas

- (1) Subpoenas authorized.** An adjudicating officer may issue a subpoena to require the attendance and testimony of any person not a classified employee and the production of any evidence not in the possession or control of a party, classified employee, principal department, autonomous entity, or agency of convenience.
- (2) Requirements.** When necessary to obtain relevant and material evidence to resolve a matter, an adjudicating officer, upon the officer's own motion or on the written request of any party, may issue a subpoena requiring the attendance and testimony of any person

not a classified employee and the production of any evidence in the person's possession or under the person's control.

- (3) **Applications and review.** An application by a party for a subpoena is normally reviewed and acted upon by the hearing officer assigned to the matter. However, in the absence of an assigned hearing officer, another hearing officer or administrative officer may grant or deny the request of a party. When available, the assigned hearing officer may reexamine the decision. A subpoena commands the person to whom it is directed to attend and testify at the civil service proceeding, to produce the things designated, or to give a deposition.
- (4) **Service, proof.** A subpoena may be served at any place within the state. The party requesting the subpoena is responsible for service of the subpoena. Service must be made by delivery of a copy to the person served. A subpoena must be served personally by an individual of suitable age and discretion who is not a party to the grievance appeal. Verified proof of service must be filed with the adjudicating officer.
- (5) **Notice to other parties.** The party requesting the subpoena shall mail to every other party a copy of the subpoena within 24 hours after service of the subpoena on the person to whom it is directed.
- (6) **Costs.** The cost of service and witness and mileage fees are borne by the party who requested the subpoena. If a subpoena is issued upon motion of the hearing officer, the costs are borne by the Department of Civil Service. Witness and mileage fees are the same as are paid to witnesses in the circuit courts of this state
- (7) **Revocation.** Any person served with a subpoena who does not intend to comply with the subpoena shall, within 7 calendar days after the date of service of the subpoena, petition in writing to revoke the subpoena. A petition to revoke is filed with the Department of Civil Service and referred to the adjudicating officer for ruling. The person filing a petition to revoke a subpoena shall serve a copy of the petition on the party who requested the subpoena. Notice of the filing of a petition to revoke must also be promptly given by the Department of Civil Service to the party at whose request the subpoena was issued. The hearing officer may revoke a subpoena if the evidence required to be produced does not relate to the matter in issue, if the subpoena does not describe the requested evidence with sufficient particularity, or if the subpoena is invalid for any other sufficient reason.

- (8) **Testimony not required.** A party at whose request a subpoena was issued is not obligated to call the witness or present the witness for cross-examination.
- (9) **Compliance.** If a person served with a subpoena fails to comply with the subpoena, the party on whose behalf it was issued may file a petition in the Michigan circuit court for an order requiring compliance. If a circuit court petition is filed, the hearing officer may adjourn the proceedings or take other action deemed appropriate. If the hearing goes forward, the hearing officer may presume that the evidence or testimony of a witness who failed to comply with the subpoena would be adverse to any party who is responsible for the failure or refusal of a witness to testify.

(e) Discovery of Medical Information

- (1) When a mental or physical condition of a party is in controversy, the hearing officer may order the prehearing discovery of medical information about the condition. Medical information subject to discovery includes, but is not limited to, medical records in the possession and control of a party, physician, hospital, or other custodian, including the Employee Services Program.
- (2) A party who has a valid privilege may assert the privilege and prevent discovery of medical information relating to the party's mental or physical condition. A privilege not timely asserted is waived in the proceeding.
- (3) Unless the hearing officer orders otherwise, if a party asserts that the medical information is subject to a privilege and the assertion has the effect of preventing discovery of medical information, the party may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or medical or physical condition.

(f) Employee Services Program

- (1) A hearing officer shall not issue any order regarding any professional assessment or counseling services provided by the Employee Services Program unless the employee receiving the services has signed a written release authorizing the disclosure of such information.

- (2) If a party refuses to sign a written release and prevents the disclosure of medical information about a mental or physical condition in contention, the party may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or medical or physical condition.
- (3) Employees of the Employee Services Program shall comply with any order of a hearing officer accompanied by a properly authorized release.

5.13 STANDARDS AND BURDENS OF PROOF

The burden of proof in a grievance appeal is allocated as follows:

- (a) **Discrimination grievance appeal.** If a grievant alleged discrimination prohibited by rule 1-8 [Prohibited Discrimination], the grievant has the burden of proving by a preponderance of the evidence that the grievant suffered a tangible adverse employment action as a result of discrimination prohibited by rule 1-8.
- (b) **Whistleblower grievance appeal.** If the grievant alleged a reprisal prohibited by rule 2-9 [Whistleblower Protection], the grievant has the burden of proving by a preponderance of the evidence that the grievant suffered a tangible adverse employment action as a result of retaliation prohibited by rule 2-9.
- (c) **Disciplinary grievance appeal.** If the grievant alleged dismissal, demotion, suspension, reduction in pay, or disciplinary lateral job change without just cause, the burden of proof in the grievance appeal is as follows:
 - (1) **Just cause for discipline.** The appointing authority has the burden of proving by a preponderance of the evidence that there was just cause to discipline the grievant.
 - (2) **Discipline.** If the appointing authority proves that there was just cause to discipline the grievant, a hearing officer cannot alter the discipline imposed by the appointing authority unless the grievant proves by a preponderance of the evidence that the particular discipline imposed by the appointing authority (1) violated a civil service rule or regulation, (2) violated a departmental work rule, or (3) was arbitrary and capricious.

- (d) **Grievance regarding abolition or creation of position.** If the grievant was aggrieved by the creation or abolition of a position, the grievant has the burden of proving by a preponderance of the evidence that (1) the grievant suffered a tangible adverse employment action as the result of the abolition or creation of a position and (2) the position was abolished or created for reasons other than administrative efficiency.
- (e) **Nondisciplinary lateral job change grievance appeal.** If the grievant was aggrieved by a nondisciplinary lateral job change, the grievant has the burden of proving by a preponderance of the evidence that (1) the grievant suffered substantial harm as a result of the lateral job change and (2) the lateral job change was arbitrary and capricious.
- (f) **Compensation grievance appeal.** If the grievant alleged that the grievant had been denied compensation to which the grievant was entitled, the grievant has the burden of proving by a preponderance of the evidence that the grievant was denied compensation to which the grievant was entitled under a civil service rule or regulation.
- (g) **Service rating grievance appeal.** If the grievant alleged that the appointing authority issued an unsatisfactory service rating without just cause, the appointing authority has the burden of proving by a preponderance of the evidence that there was just cause to issue the unsatisfactory service rating.
- (h) **Evaluation grievance appeal.** If the grievant alleged that the appointing authority issued a less-than-satisfactory overall performance-pay evaluation without just cause, the appointing authority has the burden of proving by a preponderance of the evidence that there was just cause to issue an overall less-than-satisfactory evaluation.
- (i) **General grievance appeal.** Unless otherwise specifically provided elsewhere in the civil service rules or regulations, a grievant shall have the burden of proving by a preponderance of the evidence both of the following:
 - (1) The grievant was substantially harmed by an action by the appointing authority.
 - (2) The action complained of violated one or more of the following:
 - (A) Article 11, section 5, of the Michigan constitution.
 - (B) A civil service rule or regulation

- (C) A departmental work rule.
 - (D) An enforceable written grievance settlement between the grievant and the appointing authority permitted by civil service rules or regulations.
- (j) **Recision of probationary appointment grievance.** If a grievance alleged that the appointing authority rescinded the appointment of the grievant during a probationary period and demoted the grievant to a classification level not less than the level occupied at the time of the probationary appointment:
- (1) The appointing authority must first articulate the reasons for rescinding the probationary appointment and demoting the grievant.
 - (2) The grievant must prove by a preponderance of the evidence that the recision of the grievant's probationary appointment and subsequent demotion (1) were arbitrary and capricious, (2) violated rule 1-6 [Merit, Efficiency, and Fitness], (3) violated rule 1-8 [Prohibited Discrimination], or (4) violated rule 2-9 [Whistleblower Protection].

5.14 DECISION

- (a) **Final decision.** The hearing officer shall issue a written decision setting forth the hearing officer's findings of fact, conclusions of law, and remedial orders, if any. If the decision disposes of the grievance appeal, the decision is final unless a party files a timely claim of appeal or an application for leave to appeal to the Civil Service Commission.
- (b) **Remand decision.** If the hearing officer remands the matter to the departmental level for further proceedings and does not retain jurisdiction, the remand decision is appealable as a final decision. If the hearing officer remands the matter to the department level and retains jurisdiction, the decision is appealable only as an interlocutory order.

5.15 LIMITATION ON AWARDS

- (a) A hearing officer is prohibited from awarding any of the following:
 - (1) Attorney fees.
 - (2) Witness fees.

- (3) Costs or other expenses.
- (4) Interest on any monetary award.
- (b) If the grievant is in a limited-term appointment, the senior executive service, or the senior executive management assistant service, the hearing officer cannot award damages for any period after the scheduled date of expiration of the grievant's term of appointment, except as specifically authorized in a civil service rule.

5.16 EFFECTIVE DATE OF DECISION OF ADJUDICATING OFFICER

- (a) **Effective Date.** A grievance appeal decision becomes final and binding on the parties 29 calendar days after the date the decision of the adjudicating officer is issued, unless the decision provides for a later effective date.
- (b) **Stay of Effective Date.** If a party files a further appeal to the Civil Service Commission within 28 calendar days after the date the decision was issued, the decision is automatically stayed pending further order of the Employment Relations Board or Civil Service Commission.
- (c) **Dismissal Grievances.** If a final decision of an adjudicating officer orders an appointing authority to reinstate a grievant who had been dismissed for just cause, the appointing authority, as a condition of further appeal to the Civil Service Commission, must do one of the following:
 - (1) **Temporary Reinstatement.** Temporarily reinstate the grievant to (1) a position at the classification and level held when the grievant was dismissed or (2), if the adjudicating officer ordered reinstatement at a different classification and level, to a position at the classification and level ordered by the adjudicating officer.
 - (2) **Temporary restoration of base pay and benefits.** Temporarily restore the grievant's base pay and medical, dental, and vision group insurance, at the level in effect when the grievant was dismissed.
 - (A) The temporary restoration of base pay and benefits does not reinstate the grievant to employment in the classified service.
 - (B) During a period of temporary restoration of base pay and benefits, the grievant is not entitled to any leave credit, retire-

ment credit, longevity credit or payment, additional compensation, increases in base pay, severance pay, expense reimbursement, or any other additional compensation or benefit.

- (d) If, after appeal to the Civil Service Commission, the decision of the adjudicating officer reinstating the grievant to the classified service is affirmed, the appointing authority shall make the grievant whole for the period of temporary restoration, with credit for the base pay and benefits that were temporarily restored pending appeal, unless the Civil Service Commission or court of competent jurisdiction orders otherwise.
- (e) **Back pay pending appeal.** The appointing authority is not required to pay an award of back pay or benefits until there is a final, nonappealable decision of the Civil Service Commission or a court of competent jurisdiction affirming an award of back pay.

5.17 CONFIDENTIALITY

Except for the record and published decisions of the Department of Civil Service, all files of the Department of Civil Service and its adjudicating officers relating to grievance appeals, including, but not limited to, internal correspondence, research, staff analyses, and draft decisions, are confidential and not open to the public.

6 ARBITRATION ALTERNATIVE

6.1 FILING GRIEVANCE APPEAL TO ARBITRATION

A grievant may elect to have a grievance appeal heard by an arbitrator rather than a hearing officer appointed by the Department of Civil Service. A grievant electing arbitration must first file the grievance appeal with the Department of Civil Service in compliance with subsections 5-1, 5-2, and 5-3, of this regulation. If the grievant's first filing does not clearly indicate that the grievant elects the arbitration alternative, the grievant waives the arbitration alternative and the grievance appeal must be heard by a hearing officer appointed by the Department of Civil Service.

6.2 PRE-ARBITRATION CONFERENCE

If the administrative officer does not summarily dismiss the grievance appeal, the administrative officer shall schedule a pre-arbitration conference of the parties

within 28 calendar days after the date the grievance appeal was filed. The parties may explore conciliation, stipulate as to issues and facts, and coordinate selection of the arbitrator. At the conclusion of the conference, the administrative officer shall certify the grievance appeal to arbitration.

6.3 SELECTION OF ARBITRATOR

Within 14 calendar days after the administrative officer mails the certification, the grievant must file a request with the selecting agency or acknowledge acceptance of a mutually agreed arbitrator. Unless the parties agree otherwise, the arbitrator shall be selected and the hearing conducted under the rules of the American Arbitration Association that are not inconsistent with the civil service rules and regulations. The Federal Mediation and Conciliation Service or Michigan Employment Relations Commission may be used by mutual agreement.

6.4 CONDUCT OF ARBITRATION

- (a) **Cost.** The grievant and the appointing authority shall share the cost of the arbitration equally.
- (b) **Applicable law.** An arbitrator shall decide a grievance appeal under the same substantive civil service rules and regulations that apply if the grievance appeal were heard by a civil service hearing officer under the provisions of rule 8-2 and this regulation.
- (c) **Record.**
 - (1) The arbitration must be recorded so that a written verbatim transcript of the arbitration proceedings can be made, if necessary.
 - (2) The arbitrator must retain all original documents, exhibits, pleadings, orders, and decisions. If a party appeals the arbitrator's final decision, the arbitrator shall provide the original documents, exhibits, pleadings, orders, and decisions to the Employment Relations Board on request of the appellant.
- (d) **Decision.** The arbitrator shall issue a written decision setting forth the arbitrator's findings of fact, conclusions of law, and remedial orders, if any. A remedial order of an arbitrator cannot exceed the scope of remedies available to a civil service hearing officer. The decision of the arbitrator is final unless a party files a timely claim of appeal or an application for leave to appeal to the Civil Service Commission.

7 AUTHORIZED REPRESENTATION IN GRIEVANCES AND GRIEVANCE APPEALS

7.1 BY NONEXCLUSIVELY REPRESENTED EMPLOYEES

A nonexclusively represented employee who files a grievance or appears as a party in a civil service grievance appeal proceeding may represent himself or herself or may designate one of the following as an authorized representative:

- (a)** An employee or agent of a limited-recognition organization.
- (b)** An attorney.
- (c)** Another nonexclusively-represented classified employee.
 - (1)** If the representative is an employee of the same principal department or autonomous entity (and agency of convenience, if any) as the grievant, the appointing authority shall release the representative from regularly scheduled work without loss of pay or leave credits to attend the civil service proceeding.
 - (2)** If the representative is an employee of a different principal department, autonomous entity, or agency of convenience than the grievant, the representative may be absent from the workplace to attend the civil service proceeding only if the representative's appointing authority has approved annual or personal leave.

7.2 BY EXCLUSIVELY REPRESENTED EMPLOYEES

If an exclusively represented employee files a grievance regarding a prohibited subject of bargaining under an exclusive civil service procedure, the employee may represent himself or herself or may designate one of the following as an authorized representative:

- (1)** An employee or agent of the employee's exclusive representative.
- (2)** An attorney.
- (3)** Another exclusively represented classified employee who is member of the same bargaining unit.

CONTACT

Questions regarding this regulation should be directed to the Office of the General Counsel, Department of Civil Service, P.O. Box 30002, 400 South Pine Street, Lansing, Michigan 48909, (517) 373-3048.

NOTE: Regulations are issued by the State Personnel Director under authority granted in the State of Michigan *Constitution* and the *Michigan Civil Service Commission Rules*. Regulations that implement Commission Rules are subordinate to those Rules.